No. 13,745

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM Y. FONG, as Guardian ad Litem for FONG WONE JING, FONG HUNG WING and FONG NGAR JING,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Clifton Mathews and Honorable Homer T. Bone, Associate Judges, of the United States Court of Appeals for the Ninth Circuit:

Appellants in the above-entitled cause, present this, their petition for a rehearing of the above-entitled cause, and in support thereof respectfully show:

I.

This Court in its decision dated November 23, 1954 concluded that the appellants had failed to prove that they had been denied a right or privilege as a national of the United States by any Department or agency, or executive official thereof, upon the ground that he or she was not a national of the United States. We believe this conclusion is in error for the following reasons:

1. The appellee in his opening statement admitted that the appellants had been denied by the American Consulate General in Hong Kong, an official executive of the appellee herein.

2. The appellee in his opening statement admitted that the appellants came to the United States on Certificates of Identity which are only issued after the American Consulate is satisfied that the holders thereof have been denied a right or privilege by a governmental department or agency.

3. That the appellee in his answer denied that the appellants "are the true and lawful blood children of Fong Lim Fong", a recognized United States citizen.

4. That the lower court refused a Conclusion of Law proposed by the appellee that the appellee had not denied a right or privilege to appellants as nationals or citizens of the United States.

5. That the affirmative averments of the complaint with regard to this issue were not denied.

1.

In the earlier opinion, dated August 18, 1954, this Court found that "At the hearing, counsel for appellee admitted in his opening statement that the claimed applications and denials thereof had occurred." This conclusion was supported by the record. Appellee admitted in his opening statement that counsel for the appellants had permitted counsel for appellee to review his entire file. (T. 21.) This file included the letters of the American Consulate General at Hong Kong dated January 24, 1952 denying documentation as well as the Certificates of Identity which permitted appellants to proceed to the United States. All of these facts were known when appellee, in his opening statement (T. 20), stated "we do not know why the *Consul denied* them in the first place." (Emphasis added.)

Neither in his opening statement, his evidence, nor his closing arguments did appellee in any way indicate that he was attempting to rely upon such a defense. The reasons are obvious. He conceded that the appellants had filed applications, as alleged in the complaint, and that the American Consulate General had denied them. We concede that he did not at that time know the reasons for the Consular denial but that neither defeats nor diminishes the fact that he admitted a denial in the opening statement.

2.

Appellants in their opening statement alleged that they had been issued Certificates of Identity by the

American Consul General, Hong Kong, on March 5, 1952 and that they arrived in the United States on April 6, 1952. (T. 19.) Appellee in his opening statement admitted that appellants had come forward on Certificates of Identity and that pursuant to 8 C.F.R. 112.2 (Immigration regulations promulgated under Section 503 of the Nationality Act of 1940) that they are to be regarded as aliens until otherwise finally held by the Court. (T. 21.)

Issuance of Certificates of Identity under the expressed provisions of Section 503 of the Nationality Act of 1940 are governed by Department of State regulations. No Certificate of Identity is issued by an executive official of the Department of State until he has determined that the applicant therefor has been denied a right or privilege upon the ground that he is not a national of the United States.

All of the Department of State regulations pertaining to the issuance of Certificates of Identity for admission to the United States to prosecute an action under Section 503 are set forth in 22 C.F.R. Sec. 50.18 to Sec. 50.29.

Sec. 50.19 relating to the application for a Certificate of Identity states, inter alia, that the application shall show:

> (3) That he claims to be a national of the United States, and the basis of such claim and evidence submitted in support thereof;
>
> (4) That such claim is made in good faith and upon a substantial basis;

(5) That he claims a right or privilege as a national of the United States, and specifically the nature of such claim;

(6) That such right or privilege has been denied him by a specific department or agency or executive official of the United States on the ground that the applicant is not a national of the United States, and the date and place of such denial;

(7) That an action for a judgment declaring applicant to be a national of the United States has been instituted by him * * *;

Sec. 50.20 provides:

"Independent Investigation

When an application for a certificate of identity is executed before a diplomatic or consular officer, an independent investigation of the facts in the case should be made, as far as practicable, by such officer, even though the application and proofs submitted therewith may on their face appear to justify issuance of a certificate of identity."

Section 50.21 which relates to "Good faith and substantial basis of claim of United States nationality" further limits the issuance of such documentation. Subparagraph (c) thereof reads as follows:

"Meaning of Substantial basis. A substantial basis of a claim of United States nationality means one which satisfies the diplomatic or consular officer of the United States that the claim of the applicant that he is a national of the United States is, notwithstanding any previous

> ruling of a department, agency or executive official of the United States, sufficiently meritorious to justify resort to the court for a determination of the question."

All parties to this action admit that appellants were issued Certificates of Identity by the American Consulate General at Hong Kong. In their complaint appellants allege that their applications for issuance of United States passports were denied by this same executive official, a subordinate of the appellee herein, prior to issuance of such documentation and affirmatively determined that appellants had been denied a right or privilege upon the ground that they were not nationals of the United States.

By issuance of the Certificate of Identity, the American Consulate General at Hong Kong admitted and confirmed the fact that these appellants had been denied a right or privilege upon the ground that they were not nationals of the United States. These admissions by the American Consulate General at Hong Kong, a subordinate of appellee and also the executive official responsible for the original rejection, are binding upon the appellee herein. The appellee in his opening statement, and throughout his argument to this Court, has admitted that the American Consulate General did issue such Certificates of Identity.

In other words, appellee in his opening statement knew and admitted that appellants' applications for United States passports had been denied. (See 22 C.F.R. 50.22.)

We do not deny that appellants had the burden of proof of all material allegations in the Court below. However, it makes no difference whether such facts are developed by evidence or admitted by counsel. In this case the facts pertaining to the denial were admitted by counsel and then no further proof was required.

3.

The complaint alleged in substance that appellants were the lawful blood children of Fong Lim Fong, a recognized United States citizen who had resided in the United States prior to their birth; and therefore appellants acquired United States citizenship (nationality included) at the time of their respective births pursuant to the statutes then in effect.

We have in the answer the incongruous situation where the appellee specifically denies (not on knowledge, information or belief (T. 8)) that appellants are the blood children of an American citizen, while at the same time appellee on the ground that "defendant has no knowledge, information or belief" denies (T. 9) the pleadings pertaining to processing of the applications by his own department. The whole answer should be treated as an entirety. By his answer appellee denied that appellants were nationals of the United States. (T. 10.)

This Court in *Law Don Shew v. Dulles,* Case No. 13762, decided November 24, 1954, stated that such an answer, in effect, denied that appellants were nationals of the United States. This Court further stated

"On the issue thus raised, appellant had the burden of proof, which is to say, the burden of proving that he was the son of Law See Chew."

4.

In accordance with the Order for Judgment (T. 11), counsel for appellee lodged in the District Court Findings of Fact and Conclusions of Law. The District Court refused to make a Conclusion of Law that defendant had not denied a right or privilege to appellants as nationals or citizens of the United States.

The District Court, at least tacitly, proceeded on the theory that the appellee admitted that appellants had been denied a right or privilege as nationals of the United States on the ground that they were not nationals thereof. Candor upon the part of counsel who participated in the trial would reveal such to be the true state of facts. At no time in the lower Court did counsel urge that these appellants had not been denied such a right or privilege.

In *Fontes v. Porter,* 156 F2d 956, 957, this Court held that "neither proof nor finding is requisite in respect of uncontested issues." Even more recently this Court has stated that unless clearly erroneous a finding of the District Court will be accepted as true. See *Law Don Shew v. Dulles,* supra, and citations in footnote 7.

Even though the District Court did not make a specific finding with regard to this issue, that Court

in rejecting appellee's lodged Findings of Fact and Conclusions of Law, reached a determination contrary to the present decision. The District Court rejected appellants' claim solely upon the ground that the evidence of relationship presented by appellants did not conform to the standard of proof fixed by *Ly Shew v. Acheson,* 110 F. Supp. 50.

This Court in reaching the present decision relies upon considerations which were not urged in the District Court and were not advanced as grounds for appeal in appellee's original reply brief. Compare *Brooks v. Woods,* 9 Cir. 181 F2d 716. This is the first time that this particular question has been injected into a case of this nature. It is seriously urged that the failure of appellee to assert such a defense should be regarded unfavorably. We assert that appellee cannot honestly come before this Court and state that appellants were not denied passports by the American Consulate General at Hong Kong on or about January 24, 1952.

5.

The appellants, in their complaint, allege that they filed applications for United States passports on January 24, 1951 and May 10, 1951; that they were advised by the American Consulate General at Hong Kong on or about January 24, 1952 that their applications had been denied; and that they were denied rights or privileges as nationals of the United States by an official executive of the appellee on that date. (T. 5-7.) In addition, appellants quoted from the

official correspondence received from the American Consulate General at Hong Kong dated January 24, 1952. These allegations were denied[1] by appellee on the ground "defendant has no knowledge, information or belief".

Rule 8(b) of the Federal Rules of Civil Procedure provides that a defendant may "if he is without knowledge or information sufficient to form a belief as to the truth of an averment" deny the allegations upon that ground. However, any such denial must be made in good faith.

If appellee had sufficient knowledge to file a responsive pleading denying the claim of relationship (T. 8), the claim of nationality (T. 10), and affirmatively allege in his answer that appellants "are, in fact, aliens and citizens of China" (T. 10), his answer denying information or knowledge with regard to his own actions must be treated as sham or frivolous.

Over a long period of time Courts have emphatically disapproved of the practice of making use of pro forma denials when the party can inform himself of the true facts without the slightest effort. Neither has a party the right to categorically deny an allegation when he knows or has reason to believe the

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[1]There is considerable doubt concerning the sufficiency of such a pleading as a denial since it is not couched in the form prescribed by Rule 8(b) of the Federal Rules of Civil Procedure. It is not specific nor is it directed to any particular allegation of the complaint. If such denial is not a responsive pleading and, therefore, has no effect, the affirmative allegations stand uncontroverted.

same to be true. Appellants in their pleadings quoted from official correspondence received from an executive of appellee. Appellee made no effort to determine whether the appellants had ever filed formal applications for passports as alleged, even though such records are maintained in his office.

Appellee could have informed himself with the slightest of effort. The allegations of the complaint were plainly and necessarily within the appellee's knowledge. His averment of ignorance must be palpably untrue. Without being reptitious, we once again refer to his specific denial of other allegations of the complaint which could only be made if he had knowledge concerning this matter. At the time appellee's answer was filed, the Department of State official records were available.

Paragraphs VI and VII of appellee's answer denying the specific allegations of similar numbered paragraphs of appellants' complaint should be regarded as a nullity. The facts presumably as a matter of law were within the knowledge of appellee. The facts of the complaint alleging a denial stand undisputed.

Oregon Mesabi Corp. v. C. D. Johnson Lumber Corp. (C.A. 9) 166 F2d 997, 1001; cert. den. 334 U.S. 837, 68 S. Ct. 1494, 92 L. Ed. 1762;

Lloyd Sabaudo Societa Anonime Per Azioni v. Elting (D.C., S.D., N.Y.) 46 F2d 315;

Nieman v. Bethlehem Nat. Bank (D.C., E.D., Pa.) 32 F. S. 436;

Christmas v. City of Asbury Park (D.C., N.J.) 10 F. S. 22, 25;
Reed v. Turner (D.C., E.D., Pa.) 2 F.R.D. 12.

See also:
71 C.J.S. 259;
Peacock v. United States (C.A.9) 125 F. 583, 586-587.

Under the circumstances of this case the denial on no knowledge or information respecting the matters heretofore discussed does not fall within the scope of Rule 8(b) authorization. Such denial was improper and fails to meet the requirement of good faith. It clearly appears from other parts of the answer that appellee had knowledge and information sufficient to admit or deny the facts alleged.

The decision of this Court rests upon an issue raised by a patently false denial that defendant had no knowledge, information or belief concerning a matter handled solely by his administrative agency.

II.

Appellant's Petition for a Rehearing in Chow Sing v. Herbert Brownell, Jr., No. 13746, filed this date, is incorporated herein and made a part of this brief.

CONCLUSIONS.

The liberty, freedom, and future lives of these appellants are seriously impaired by the decision of this

Court. Upon a technical nicety, which was never urged by the defendant in the lower Court, their right to a judicial determination of United States nationality as provided by Congressional enactment is to be denied. The ends of justice would be better served by affording appellants an opportunity to present their claim.

For the reasons stated above, appellants request that a rehearing be granted and that on such rehearing the judgment of this Court be reversed.

Dated, San Francisco, California,
December 22, 1954.

Respectfully submitted,
JOSEPH S. HERTOGS,
Attorney for Appellants and Petitioners.

Certificate of Counsel

I hereby certify that I am counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 22, 1954.

Joseph S. Hertogs,
Attorney for Appellants and Petitioners.